

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

Shasta Strategic Inv. Fund, et al.,

Petitioners,

v.

United States of America,

Respondent.

NO. C 04-04264 JW  
NO. C 05-01123 JW  
NO. C 05-01996 JW  
NO. C 05-02835 JW  
NO. C 05-03887 JW  
NO. C 04-04398 JW  
NO. C 04-04309 JW  
NO. C 04-04964 JW

**ORDER DENYING AS PREMATURE  
RESPONDENT'S MOTION TO EXCLUDE  
TESTIMONY OF STUART A. SMITH**

Sixty-Three Strategic Inv. Funds, et al.,

Petitioners,

v.

United States of America,

Respondent.

Sixty-Three Strategic Inv. Funds, et al.,

Petitioners,

v.

United States of America,

Respondent.

Twenty-Two Strategic Inv. Funds, et al.,

Petitioners,

v.

United States of America,

Respondent.

Twenty-Two Strategic Inv. Funds, et al.,

Petitioners,

v.

United States of America,

Respondent.

Sanford Strategic Inv. Fund, et al.,

Petitioners,

v.

United States of America,

Respondent.

Belford Strategic Inv. Fund, et al.,

Petitioners,

v.

United States of America,

Respondent.

Sill Strategic Inv. Fund, et al.,

Petitioners,

v.

United States of America,

Respondent.


Presently before the Court is Respondent's Motion to Exclude the Testimony of Stuart Smith.<sup>1</sup> The government moves to exclude Mr. Smith's testimony on the grounds that (1) his opinions relate only to partner level defenses, which are outside of the Court's jurisdiction; and (2) his testimony consists of legal analysis and legal conclusions regarding the reasonableness of Petitioners' actions, and thus impermissibly invade the province of the Court. (Motion at 2.) Petitioner responds that Mr. Smith's opinions regarding the quality of the tax-opinion letters

<sup>1</sup> (United States' Motion Under Federal Rules of Evidence 401 and 702 to Exclude the Expert Report and Testimony of Stuart Smith, hereafter, "Motion," Docket Item No. 136 in C 04-4264; Docket Item No. 37 in C 05-2835; Docket Item No. 80 in C 05-1123; Docket Item No. 23 in C 05-3877; Docket Item No. 14 in C 05-1996; Docket Item No. 36 in C 04-4398; Docket Item No. 46 in C 04-04309; Docket Item No. 37 in C 04-4964.)

1 received by Petitioners will assist the jury in determining whether Petitioners acted reasonably in  
2 entering the tax transactions at issue.<sup>2</sup>

3       Upon review, because Respondent's Motion is directed to the relevance, and not the  
4 reliability of Mr. Smith's testimony under Daubert, the Court finds that Respondent's Motion would  
5 be more properly heard as a motion *in limine* by the trial judge. Accordingly, in light of the Court's  
6 pending retirement,<sup>3</sup> the Court DENIES as premature Respondent's Motion to Exclude. Respondent  
7 may re-notice its Motion upon reassignment to a new judge at the appropriate time.

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10 Dated: August 7, 2012

  
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JAMES WARE  
United States District Chief Judge

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26       <sup>2</sup> (Petitioners' Opposition to Respondent's Motion to Exclude the Expert Report and  
27 Testimony of Stuart A. Smith, Docket Item No. 41.)

28       <sup>3</sup> On April 28, 2012, Chief Judge Ware announced that he plans to "retire in August 2012 as  
the terms of his current law clerks come to an end." See Chief Judge Ware Announces Transition,  
*available at* <http://www.cand.uscourts.gov/news/82>.

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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8 **Dated: August 7, 2012**

**Richard W. Wieking, Clerk**

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11 **By: /s/ JW Chambers**

12 **William Noble**

13 **Courtroom Deputy**  
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